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No. 92-588

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HELEN B. BARNES, M.D.; JOSEPH MITCHELL, M.D.; JOSEPH BOOKER, M.D., on behalf of themselves, their patients, and all others similarly situated; NEW WOMAN MEDICAL CENTER, INC.; and MISSISSIPPI WOMEN'S MEDICAL CENTER,

Petitioners,

v.

MIKE MOORE, as Attorney General of the State of Mississippi, and his employees, agents and successors,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

Respondent Mike Moore, Attorney General of the State of Mississippi, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the United States Court of Appeals for the Fifth Circuit. That opinion is reported at 970 F.2d 12 (5th Cir. 1992).

STATUTES INVOLVED

The text of the Mississippi Informed Consent to Abortion Act, Miss. Code Ann. § 41-41-31, *et seq.* (Supp.), is contained in the Appendix to the Petition, 15a-19a. The

Act does not prohibit abortions. Instead, as observed by the Court of Appeals, the Act is substantially identical to that of Pennsylvania approved in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, —— U.S. ——, 120 L.Ed.2d 674 (1992). Where in a physician's best clinical judgment a medical emergency exists so that an immediate abortion is necesary, the requirements of the Act are waived.

Briefly, Section (a) of § 41-41-33 requires that certain information of a medical nature be disclosed by the physician. A referring physician rather than the abortion provider may give this information. Subsection 2(a)(ii) requires the physician to disclose particular medical risks of abortion "when medically accurate" including the "risks of infection, hemorrhage, danger to subsequent pregnancies and infertility." Under the statute, only "medically accurate" information is required to be disclosed. Except for the fact that the physician must give medically accurate information as to the risk—or non-risk as the case may be—for infection, hemorrhage, and potential future pregnancy complications (all of which are documented possible medical complications), the physician under the Act is free to exercise his professional judgment to inform the woman of the particular risks to her of the procedure, and to give whatever individualized medical information may be appropriate. Subsection 2(a)(iii) requires the physician to inform the patient of the gestational age of the fetus. Subsection 2(a)(iv) requires that the woman patient be advised by the physician of the "medical risks associated with carrying her child to term," that is, of the medical alternative to abortion, which is normal childbirth. These provisions are virtually identical to that of Pennsylvania, *see Casey*, 120 L.Ed.2d at 731-732 (Appendix to Opinion).

Section 2(b) ensures that a pregnant woman is at least aware of a possibility of assistance during pregnancy and after childbirth. To meet the minimum floor of disclosure required by the Act, only a scintilla of informa-

tion is mandated. Subsection 2(b)(i) provides that the patient be informed "that medical assistance benefits may be available for prenatal care, childbirth, and neonatal care." Subsection 2(b)(ii) requires only that the woman be informed "that the father is liable to assist in the support of her child. . . ." Section 2(b)(iii) requires that the woman be advised that there are available private and public services for pregnancy prevention. A physician's agent, rather than the physician, may provide this information. These requirements are materially indistinguishable from that of Pennsylvania, *see Casey, supra.*

Sections 2(b)(iv) and 3 ensure that the woman has an opportunity, if she so desires, to review objective materials describing fetal development and a list of agencies providing relevant alternative services. The Act requires that a woman be informed by the physician's agent of her opportunity to review printed materials provided by the State and which describe the stages of fetal development and list agencies that offer alternatives to abortion. Section 3 of the Act describes the printed materials to be made available, which are to be "objective, nonjudgmental, and designed to convey only accurate information." These provisions are similar to Pennsylvania's statute, *see* 120 L.Ed.2d at 734.

Like Pennsylvania's Act, Mississippi's statute requires a 24-hour waiting period between the time of disclosure of information and the performance of the abortion, except in cases of medical emergency. No disclosure or waiting period is required where in a physician's best clinical judgment a "medical emergency" exists. The medical emergency definition is virtually identical to that of Pennsylvania approved in *Casey* and serves the same function. 970 F.2d at 14-15.

REASONS WHY THE PETITION SHOULD BE DENIED

I. MISSISSIPPI'S INFORMED CONSENT ACT IS SUBSTANTIALLY IDENTICAL TO THAT APPROVED IN *CASEY*, AND THE CORRECT RESULT WAS REACHED BY THE COURT OF APPEALS.

In this Court's judgment last term in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, —— U.S. ——, 120 L.Ed.2d 674 (1992), seven Members of the Court agreed that the informed consent/24-hour waiting period provision of Pennsylvania's Abortion Control Act, with its medical emergency exception, was constitutional on its face, 120 L.Ed.2d at 716-721 (Joint Opinion); *id.* at 758, 773-775 (opinion of Rehnquist, C.J., concurring in the judgment in part and dissenting in part). As stated by the Fifth Circuit Court of Appeals in the instant case, and as Respondent has pointed out in the foregoing section, the provisions of Mississippi's Informed Consent to Abortion statute, Miss. Code Ann. § 41-41-31, *et seq.* (Supp.), are "substantially identical" to the relevant part of Pennsylvania's statute held constitutional on its face in *Casey*. 2a; 970 F.2d at 13.[1] There is no material distinction between the statutes.

In the context of the facial challenge here, this salient and controlling point—barely acknowledged in the abortion providers' petition in this Court—was dispositive as a matter of law. Since Mississippi's informed consent/waiting period statute is virtually identical in every material respect to that of Pennsylvania, the result reached in the Court of Appeals in this narrow circumstance was not only correct but was mandated under the principle

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[1] As the Court of Appeals further pointed out, Mississippi's informed consent/24-hour waiting period statute does not include several types of provisions included in Pennsylvania's Abortion Control Act reviewed in *Casey*. Mississippi's statute does not contain, for example, the spousal notification, recordkeeping, and informed parental consent features of Pennsylvania's abortion act. 2a; 970 F.2d at 13.

that lower federal courts must adhere to the holdings of the Supreme Court. As the Court of Appeals implicitly recognized, where the issue is *facial* constitutionality, there can be no principled basis to hold that specific statutory provisions deemed constitutional on their face in one State could somehow become invalid on their face as an identical measure in a Sister State.[2] In view of the fact that Mississippi's informed consent/24-hour waiting period/medical emergency statute is virtually identical to that of Pennsylvania, the result reached by the Court of Appeals—to uphold the constitutionality of the statute on its face as a matter of law—was the only possible outcome, and there is accordingly no good reason for this Court to further review that correct result.

II. THE NARROWLY-DRAWN OPINION OF THE COURT OF APPEALS IS NOT AN APPROPRIATE VEHICLE BY WHICH TO REVIEW THE BROAD QUESTION PRESENTED IN THE PETITION.

Because Mississippi's informed consent/24-hour waiting period statute is essentially identical to that approved on its face by seven Members of the Court in *Casey*, and because this was a facial challenge, the question presented by the Petitioners in generic fashion does not accurately reflect the narrow and particularized context in which the Court of Appeals ruled. The broad Question proposed by Petitioners here—whether some generic "statute" must be put to some "evidentiary" hearing to determine in open-ended fashion if some undefined "undue burden" exists, without any apparent reference to the opinions of this Court and its Members (Pet. i)—was not decided

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[2] Such an approach to questions of the facial constitutionality of State abortion regulations, if authorized, would not only dismay and confuse the public but would also confound State legislators of the various states who rely upon the decisions of this Court in determining what measures are, and are not, permissible in this area.

and was not addressed by the Court of Appeals. Instead, the Court of Appeals prudently confined its holding of constitutionality to the particular circumstances before it: a facial attack upon a statutory provision identical to that which had been approved as constitutional on its face by this Court in *Casey*. 3a, 6a,-7a; 970 F.2d at 14-15. Having ruled on narrow and easily sustainable grounds, the Court of Appeals' judgment is accordingly not an appropriate springboard to review of the broad proposition sought to be launched by petitioners here.[3]

Moreover, Respondent further submits that the traditional criteria which might warrant the exercise of the Court's certiorari jurisdiction do not exist here. There is no conflict among the Circuit Court of Appeals regarding the subject matter of the Fifth Circuit's decision in the instant case, nor do the Petitioners claim any current conflict with the highest court of a State or among other lower federal courts. Indeed, the complete absence of any cited conflict whatsoever is not surprising in light of the fact that Petitioners essentially demand the Court to revisit, and to reinvent, its judgment just four months ago in *Casey* with regard to the facial constitutionality of a substantially identical informed consent/waiting period statute. Thus, even assuming in the abstract that the Petitioners have presented a viable issue—a point not conceded in any manner by Respondent—no conflict among the Circuits or disagreement of other courts with the Fifth Circuit has had time to mature. In the absence of any conflict in the lower courts, review in this Court of the Fifth Circuit judgment would be premature.

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[3] Indeed, if review were granted, this Court would ordinarily seek to rule on the narrowest grounds available and to avoid if possible any unduly broad proposition of constitutional law. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-347, 80 L.Ed. 688 (1936) (Opinion of Brandeis, J.).

III. THE PETITION SETS FORTH NO GOOD REASONS TO GRANT REVIEW.

No good reasons for the Court to grant a writ of certiorari in this case have been presented in the petition. As observed by the Fifth Circuit, the Petitioners at oral argument before that court "essentially conceded" that they were unlikely to succeed on the merits of their facial challenge in view of the recent decision of this Court in *Casey*. App. 2a; 970 F.2d at 13. The abortion providers nevertheless claim here that the Court should review the Fifth Circuit judgment holding Mississippi's informed consent statute constitutional as a matter of law because, in their view, the Joint Opinion of Justices O'Connor, Kennedy, and Souter (1) mandates some type of full evidentiary hearing as to every non-prohibitory abortion regulation to determine anew whether some generic and undefined undue burden exists (regardless of the fact that seven Members of the Court might have approved an identical measure), Pet. at 7-20; and (2) the Joint Opinion implicitly overrules the standard utilized to determine the *facial* constitutionality of an abortion regulation. Pet. at 21-25. At least with regard to informed consent/24-hour waiting period abortion regulations, however, the longstanding individual views of various Justices have now converged to form a consensus at least as to the validity of these specific measures.[4]

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[4] *See Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 452, 472-474, 76 L.Ed.2d 678 (1983) ("Akron I") (O'Connor, J., dissenting, joined by White and Rehnquist, JJ.) (24-hour waiting period with a medical emergency exception is not an undue burden on any abortion right); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 785, 798-804 (1986) (White, J., dissenting, joined by Rehnquist, J.); *id.* at 782-785 (Burger, C.J., dissenting); *id.* at 814, 829-831 (O'Connor, J., dissenting); *Casey*, 120 L.Ed.2d at 716-721 (Joint Opinion of Justices O'Connor, Kennedy, and Souter); *id.* at 773-775 (Rehnquist, C.J., joined by White, Scalia, and Thomas, JJ., concurring in the judgment in part and dissenting in part). While there was disagreement among the seven Members of the relevant majority in *Casey* as to

First, Respondent respectfully submits that the abortion litigators' nirvana envisioned by Petitioners—an evidentiary hearing with a case-by-case "factual" analysis and relitigation of every abortion regulation—is nowhere required by the specific text of the Joint Opinion that is operative as to the statute here, fairly read. *See* 120 L.Ed.2d at 718-719. The Petitioners' essential premise for their position that those statutes determined to be facially constitutional in *Casey* may be relitigated in each State is that the *Casey* holding "was based on a limited factual record developed under the strict scrutiny standard of review." Pet. at 8. That premise of Petitioners is fictional in nature.[5] To be sure, the district court record is mentioned in the Joint Opinion with re-

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the precise standard of review which should be applied, there was no such disagreement as to the basic result which should obtain regarding the type of measure at issue here.

[5] The suggestion that there was a "limited factual record" in the lower court in *Casey* is indeed a bit of revisionist history now launched by the same professional abortion litigation firm that tried *Casey* in the district court and argued it before this Court. Because the implications of *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), were apparent to both sides in the district court in *Casey*, a full record as to the purported "burdens" of the 24-hour waiting period was made, and the district court's overall findings and conclusions in the case encompassed some 75 pages. 744 F. Supp. 1323 (E.D. Pa. 1990). The district court's lengthy findings on the waiting period in *Casey* could not have been more adverse to the State of Pennsylvania; *see* 744 F. Supp. at 1351-1352. The Plaintiffs' proof and conclusions were accepted in every respect by the district court in *Casey*. The district court made 14 specific findings of fact based on the trial testimony concerning the significant burden and risks a 24-hour waiting period would impose, Findings 190-203, 744 F. Supp. at 1351-1352. Based on those adverse findings, the district court further concluded that a 24-hour waiting period imposed a "legally significant burden" on Pennsylvania women, that "many women must travel substantial distances to reach the nearest abortion provider," that a woman's travel and exposure to demonstrators would be doubled, the costs "significantly increase[d]," and the impact felt greatest by Pennsylvania's poor and rural women. 744 F. Supp. at 1378-1379 & n.34. This Court nevertheless upheld the statute on its face.

gard to the 24-hour waiting period (as is the operative point that the challenge is a "facial" one, 120 L.Ed.2d at 721). Respondent submits, however, that the net effect of that reference, in light of the extensive adverse factual findings made by the *Casey* district court, is to confirm that a short 24-hour waiting period after disclosure is not an "undue burden" and is valid on its face as a matter of constitutional law where a medical emergency exception is provided.[6]

As the Court of Appeals recognized, there is no inherent or absolute right to an evidentiary hearing, in abortion litigation or elsewhere, where the defined legal standard plainly dictates the outcome as a matter of law. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L.Ed.2d 265 (1986). Put simply, neither the creative zeal of these abortion providers not their purported "evidence" belatedly submitted to the Fifth Circuit in affidavits and newspaper articles, *see* Pet. at 8-9, 22a-40a, after the merits of the appeal had been decided,[7] can change the result or warrant a remand in the context of the particular facial challenge here. These purported "facts" are not materially different from those proffered in *Casey*.[8]

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[6] *See Casey*, 120 L.Ed.2d at 720-721: "Although [the district court's] findings are troubling in some respects . . . they do *not* demonstrate that the waiting period constitutes an undue burden." (emphasis supplied).

[7] The Petitioners did not seek a rehearing on the merits before the Fifth Circuit after the appeal was decided. Instead, they chose the extraordinary route of filing before the Court of Appeals a motion for a stay of the mandate and for an injunction pending their filing of a certiorari petition to this Court.

[8] Respondent questions the factual accuracy or the admissibility of substantial portions of these materials. An abortion provider claims, for example, that the number of abortions he performed dropped in the two weeks after Mississippi's statute was permitted to go into effect by the Court of Appeals. 30a. While Respondent has no way of verifying the truth of this claim, the

The Petitioners further suggest that the Fifth Circuit also erred by relying on the test for the facial invalidity of a statute set forth in such cases as *United States v. Salerno*, 481 U.S. 739, 745, 95 L.Ed.2d 697 (1987).[9] Pet. at 21. They essentially contend that the Joint Opinion in *Casey* overruled the *Salerno* standard.

The Joint Opinion in *Casey* does not purport to overrule *Salerno*, nor any of the abortion cases which have expressly and properly followed that test, *see Webster v. Reproductive Health Services*, 492 U.S. 490, 524 (O'Connor, J., concurring); *Ohio v. Akron Center for Reproductive Health*, —— U.S. ——, 111 L.Ed.2d 405, 420 (1990) ("Akron II") (Kennedy, J.). At least insofar as the informed consent/waiting period measures are concerned, which are the only type of provisions at issue in this case, the disposition in *Casey* is consistent with the *Salerno-Akron II* test.[10] The Court of Appeals was correct in its determination that *Salerno* and *Akron II* had not been overruled *sub silentio*.

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fact of the matter is that there is no requirement that a state which is seeking to ensure informed choice act in a manner so as to "maximize the number of abortions," *see Thronburgh*, 476 U.S. 747, 801 (1986) (White, J., dissenting), nor that a state's legitimate statutes be "fine tuned" so as to enhance or promote abortion, *see H. L. v. Matheson*, 450 U.S. 398, 413, 67 L.Ed.2d 388 (1981).

[9] Under that standard, "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Salerno, supra.*

[10] Indeed, it appears the Joint Opinion implicitly utilized the facial invalidity test where the measure reviewed was deemed to reasonably enhance the opportunity for informed choice. With regard to the waiting period, for example, the Joint Opinion specifically rejected the contention that the "'particularly burdensome' effects of the waiting period on *some women* require its invalidation," 120 L.Ed.2d at 721 (emphasis supplied). This is squarely consistent with one of the distinguishing features of the facial invalidity test, that is, that a "worst case" scenario as to some does

IV. THE POSITION ADVANCED BY PETITIONERS, IF ACCEPTED, WOULD ENGENDER CONFUSION AND UNCERTAINTY IN THIS AREA OF THE LAW.

In addition, Respondent submits that the practical effect of Petitioners' position, if accepted in this case, would be further confusion and uncertainty in this area, accompanied by continuous litigation and relitigation of the facial constitutionality of identical laws in different States. Under the Petitioners' version of abortion litigation nirvana, each of the fifty States could determine that a short 24-hour waiting period measure was appropriate—a provision that seven Justices of this Court have agreed is a legitimate and reasonable adjunct to informed choice—and yet each of the fifty would be required to litigate various and sundry demographic "facts" on some type of *ad hoc* basis before the *facial* constitutionality of the identical statutes could be established.

The Petitioners' agenda would surely turn the federal district courts into nothing more than a second, "super," legislature. In the context of a facial challenge, Petitioners' version of constitutional adjudication is a notion that runs contrary to the rule that federal district courts do not sit to redetermine "legislative" facts (as opposed to "adjudicative" facts), *Vance v. Bradley*, 440 U.S. 93, 112, 59 L.Ed.2d 171 (1979).

Moreover, if, as Petitioners suggest, the facial validity of a 24-hour waiting period must vary from State to State based on such matters as the particular geographical dimensions of a State, the particular demographics of a State, or the particular (and always changing) commercial abortion market characteristics of a State or political subdivision, then how is a federal district judge to distinguish or to assess such arcane "facts?" By the number of abortion clinics per square mile, or some other con-

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not suffice to strike down a statute on its face. *See Akron Center II*, 111 L.Ed.2d at 420.

trived statistic? In such circumstances, conflicting results are inevitable. Respondent respectfully submits that Petitioners' position cannot be the rule. Just as the condition of indigency cannot be considered to be a state-imposed barrier to abortion, *see Harris v. McRae*, 448 U.S. 297, 316 (1980), neither the private, voluntary business decisions of abortion providers as to where they decide to commercially locate or relocate, nor the essentially private circumstance of where people happen to live in relation to those commercial abortion providers, is the product of state action.

Finally, and for similar reasons, the *ad hoc* test proposed by Petitioners would create confusion for State legislators who seek to model legislation to conform with the holdings of this Court as to the constitutionality of specific abortion regulations. Uncertainty would be engendered, and the facial constitutionality of any particular legislative measure could never be predicted with confidence.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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